ECORD
AND
RIEFS

Supreme Court, U.S.
FILED
SEP 18 2017
OFFICE OF THE CLERK

Nos. 16-1436 and 16-1540

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

v.

STATE OF HAWAII, ET AL.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF OF REFUGEE ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

CHRISTOPHER MORTWEET
K. RUBY BIELIK
LATHAM & WATKINS LLP
140 Scott Drive
Menlo Park, CA 94025
(650) 326-4600

RICHARD P. BRESS
Counsel of Record
ALEXANDRA SHECHTEL
ALAN BILLHARZ
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
rick.bress@lw.com

Counsel for Amici Curiae *Oxfam America, Inc., International Rescue Committee, and Exodus Refugee Immigration Inc.*

Additional Counsel Listed on Inside Cover

JAYNE FLEMING
REED SMITH LLP
599 Lexington Avenue
22nd Floor
New York, NY 10022
(212) 549-0217

JAMES C. MARTIN
DONNA M. DOBLICK
DEVIN M. MISOUR
REED SMITH LLP
225 Fifth Avenue
Suite 1200
Pittsburgh, PA 15222
(412) 288-3131

Counsel for Amicus Curiae *U.S. Committee for Refugees and Immigrants*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF AMICI 1

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. THE PRESIDENT'S REDUCTION OF THE REFUGEE CAP VIOLATED THE TIMING AND CONSULTATION REQUIREMENTS OF 8 U.S.C. § 1157 7

A. The President's Unilateral Reduction Of The Refugee Cap Violated The Requirements Of Section 1157 8

B. The President's Ad Hoc And Post Hoc Action Undermined The Underlying Goals Of Section 1157 14

II. THE PRESIDENT'S REDUCTION OF THE REFUGEE CAP AND TEMPORARY BAN ON ALL REFUGEE ADMISSIONS EXCEED THE AUTHORITY CONGRESS DELEGATED TO THE PRESIDENT UNDER 8 U.S.C. § 1182(f) 16

III. EO2, INCLUDING THE ANTI-REFUGEE PROVISIONS OF SECTION 6, IS A THINLY VEILED ATTEMPT TO EXCLUDE MUSLIMS ON RELIGIOUS GROUNDS IN VIOLATION OF THE ESTABLISHMENT CLAUSE 26

TABLE OF CONTENTS—Continued

Page

A. President Trump's Statements Evince Clear Anti-Muslim Animus 27

B. The Bias Animating EO2 Extends To Section 6 34

CONCLUSION 36

TABLE OF AUTHORITIES

Page(s)

CASES

Beech Aircraft Corp. v. Rainey,
488 U.S. 153 (1988) 18

Duncan v. Walker,
533 U.S. 167 (2001) 19

Edwards v. Aguillard,
482 U.S. 578 (1987) 27

Ethyl Corp. v. EPA,
51 F.3d 1053 (D.C. Cir. 1995) 11

First National Bank of Atlanta v. Bartow County Board of Tax Assessors,
470 U.S. 583 (1985) 13

Kerry v. Din,
135 S. Ct. 2128 (2015) 27

Kleindienst v. Mandel,
408 U.S. 753 (1972) 27

Louisiana Public Service Commission v. FCC,
476 U.S. 355 (1986) 10

McCreary County v. American Civil Liberties Union of Kentucky,
545 U.S. 844 (2005) 27, 34

TABLE OF AUTHORITIES—Continued

Page(s)

Reno v. Bossier Parish School Board,
520 U.S. 471 (1997) 34

Town of Greece v. Galloway,
134 S. Ct. 1811 (2014) 27

United States v. Menasche,
348 U.S. 528 (1955) 18

STATUTES AND REGULATIONS

8 U.S.C. § 1101 *et seq.* 5

8 U.S.C. § 1101(a)(42) 20

8 U.S.C. § 1157 5

8 U.S.C. § 1157(a) 8

8 U.S.C. § 1157(a)(2) 8

8 U.S.C. § 1157(b) 8, 9

8 U.S.C. § 1157(d) 9

8 U.S.C. § 1157(d)(1) 9

8 U.S.C. § 1157(e) 8

8 U.S.C. § 1182(f) 6, 17

8 U.S.C. § 1522(a)(1)(B) 15

8 U.S.C. § 1522(a)(2)(A) 15

TABLE OF AUTHORITIES—Continued

Page(s)

Executive Order No. 13,768, 82 Fed. Reg. 8977 (Jan. 27, 2017) 4, 5, 32

Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) 1, 5, 18, 19, 34

LEGISLATIVE MATERIALS

123 Cong. Rec. 3431 (1977) 8

Admission of Refugees into the United States: Hearings on H.R. 3056 Before the Subcomm. on Immigration, Citizenship and Int'l Law of the H. Comm. on the Judiciary, 95th Cong. (1977) 15

H.R. Rep. No. 96-608 (1979) 12

Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of H. Comm. on the Judiciary, 96th Cong. (1979) 9, 10, 13, 15, 16

OTHER AUTHORITIES

Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9 (1981) 8, 12, 14

TABLE OF AUTHORITIES—Continued

Page(s)

Fred Barbash, *Muslim ban language suddenly disappears from Trump campaign website after Spicer questioned*, Wash. Post, May 9, 2017 ..... 26, 28

David Bier, CATO Institute, *Deconstructing Trump's Security Defense of His Immigration Ban* (Mar. 9, 2017), http://bit.ly/2xgHdZu 20, 24, 25

Black's Law Dictionary (10th ed. 2014) 18

Dan Bowens, *Trump tweets fake Gen. Pershing story after Spain attack*, FOX 5 (Aug. 17, 2017), http://bit.ly/2jjr8wH 31

Michael Brindley, *After Trump's Executive Order, Refugees Who Were N.H. Bound Now On Hold*, N.H. Pub. Radio (Jan. 31, 2017), http://bit.ly/2pwf6hT 24

David Brody, *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority As Refugees*, CBN News (Jan. 27, 2017), http://bit.ly/2kCqG8M 32

Philip Connor, Pew Research Center, *U.S. Admits Record Number of Muslim Refugees in 2016* (Oct. 5, 2016), http://pewrsr.ch/2cSmd2t 35

TABLE OF AUTHORITIES—Continued

Page(s)

Madeline Conway, *Trump stokes fears he'll pursue Muslim ban*, Politico (Dec. 22, 2016 8:09 AM), http://politi.co/2hgmkXM 30

Delegation of Power by Congress, 48 Harv. L. Rev. 798 (1935).....18

Jeremy Diamond, *Donald Trump: Ban all Muslim travel to U.S.*, CNN (Dec. 8, 2015), http://cnn.it/1QbhhSR 28

Donald Trump: "...You Know my Plans...", Daily Mail.com (Dec. 22, 2016), https://www.youtube.com/watch?v=ip4vs PInyRY.....30

Elise Foley & Willa Frej, *Court Ruling May Force Trump To Admit The Number Of Refugees Obama Wanted*, Huffington Post, Mar. 20, 2017, http://huff.to/2mUyCGi 23

Lauren Gambino, *Trump and Syrian refugees in the US: separating the facts from fiction*, The Guardian (Sept. 2, 2016), http://bit.ly/2fQF0wP.....25

Nick Gass, *Trump not bothered by comparisons to Hitler*, Politico (Dec. 8, 2015 7:51 AM), http://politi.co/1XYTrc8 28

TABLE OF AUTHORITIES—Continued

Page(s)

General Pershing on How to Stop Islamic Terrorists, Snopes (last updated Aug. 17, 2017), http://www.snopes.com/rumors/pershing.asp 31

Natasha Hall, *Refugees are already vigorously vetted. I know because I vetted them.*, Wash. Post, Feb. 1, 2017 23

Louis Jacobson, *Donald Trump says if you're from Syria and a Christian, you can't come to the U.S. as a refugee*, PolitiFact (July 20, 2015), http://bit.ly/1CLkBPj 32

Scott Johnson, *At the White House with Trump*, Power Line (Apr. 25, 2017), goo.gl/ZeXqhY 33

Erol Kekic, *Homeland Security Chief John Kelly Says Waiting 120 Days Won't Hurt Refugees. He's Wrong*, Time (Feb. 10, 2017), http://ti.me/2lTAYT8 ..... 23, 24

LBJ Presidential Library, LBJ on Immigration, *President Lyndon B. Johnson's Remarks at the Signing of the Immigration Bill Liberty Island, New York* (Oct. 3, 1965), http://www.lbjlibrary.org/lyndon-baines-johnson/timeline/lbj-on-immigration 17

TABLE OF AUTHORITIES—Continued

Page(s)

Legal Information Institute, *8 U.S. Code § 1157 - Annual admission of refugees and admission of emergency situation refugees*, https://www.law.cornell.edu/uscode/text/8/1157 14

Kevin Lui, *Comments by Stephen Miller and Rudy Giuliani Cited in Judge's Decision to Block Trump's Travel Plan*, Time (Mar. 15, 2017), http://ti.me/2wSX0hh 33

Medical Examination: Frequently Asked Questions (FAQs), Ctr. for Disease Control and Prevention (last updated Feb. 22, 2017), http://bit.ly/2ocISHp 23

Tanvi Misra, *Are Refugees Dangerous?*, Citylab (Feb. 14, 2017), http://bit.ly/2sSlg1f 25

Nearly Half of All Refugees are Children, Says Unicef, The Guardian, (Sept. 14, 2016), http://bit.ly/2cmFfek 20

Alex Nowrasteh, *Americans' Fear of Foreign Terrorists Is Overinflated* (Sept. 13, 2016), http://ti.me/2jKIQVK 25

Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, Policy Analysis (Sept. 13, 2016), http://bit.ly/2kem9fJ 24, 25

TABLE OF AUTHORITIES—Continued

Page(s)

Mathew Nussbaum, *Flynn's son says 'Muslim ban' is 'necessary'*, Politico (Jan. 29, 2017), http://politi.co/2k6e2jr 32

Haeyoun Park & Larry Buchanan, *Refugees Entering the U.S. Already Face a Rigorous Vetting Process*, N.Y. Times, Jan. 29, 2017 .....21, 22, 23

Pew Research Center, *Religious Composition by Country, 2010-2050* (Apr. 2, 2015), http://pewrsr.ch/2nMIS0G.....35

Amy Pope, *Infographic: The Screening Process for Refugee Entry into the United States*, Obama White House Archives (Nov. 20, 2015), http://bit.ly/2kqqbmh.....21

Jacob Pramuk, *Trump may have just dealt a blow to his own executive order*, CNBC (updated Mar. 16, 2017), http://cnb.cx/2p4LPOi.....33

Presumptive GOP Nominee Trump Goes One-on-One With Lester Holt at 2:07, NBC News (May 4, 2016), http://nbcnews.to/1SZtIAq 29

Katie Reilly, *Donald Trump on Proposed Muslim Ban: 'You Know My Plans'* (Dec. 21, 2016), http://ti.me/2hWs4FG.....30

TABLE OF AUTHORITIES—Continued

Page(s)

Theodore Schleifer, *Donald Trump: 'I think Islam hates us'*, CNN (Mar. 10, 2016), http://cnn.it/1RBk6Z4 29

Ann M. Simmons, *We don't know exactly what 'extreme vetting' will look like, but screening for refugees is already pretty tough*, L.A. Times, Jan. 29, 2017, http://lat.ms/2jKJvsP 23

Lesley Stahl, *The Republican Ticket: Trump and Pence*, 60 Minutes (July 17, 2016), http://cbsn.ws/29NrLqj 31

Alex Swoyer, *Donald Trump Quotes the Bible at Liberty University, Tells Youth 'Never Give Up'*, Breitbart (Jan. 18, 2016), http://bit.ly/2xVv2yw 29

Donald J. Trump (@realDonaldTrump), Twitter (Aug. 17, 2017, 11:45 AM), http://bit.ly/2fO75Fi 31

Donald J. Trump (@realDonaldTrump), Twitter (Mar. 22, 2016, 7:59 PM), http://bit.ly/2wl9EBt 29

Donald J. Trump for President, Inc., *Donald J. Trump Calls for American Independence, Lays Out Need for Immigration Security* (Aug. 24, 2016), http://bit.ly/2wqaLzG 30

TABLE OF AUTHORITIES—Continued

Page(s)

Trump Signs Executive Orders at Pentagon, ABC News (Jan. 27, 2017), https://goo.gl/7Jzird 31

Trump's Deleted "Preventing Muslim Immigration" Statement, The Memory Hole (Dec. 7, 2015), http://bit.ly/2wVdcML 26, 28

U.S. Comm. for Refugees and Immigrants (USCRI), *Security screening of refugees admitted to the United States*, http://refugees.org/wp-content/uploads/2015/12/USCRI-Security-Screening-Process-5.16.16.pdf (last visited Sept. 14, 2017) 22

UNHCR, *Global Trends: Forced Displacement in 2015* (2016), http://bit.ly/2wVw5AU 35

United States Citizenship and Immigration Services (USCIS), Dep't of Homeland Security, *Refugee Processing and Security Screening* (last updated Dec. 3, 2015), http://bit.ly/1YodRyW 21, 22

US Refugee Admissions Program: An overview of built-in security safeguards for refugee resettlement, Int'l Rescue Comm., http://bit.ly/2oeddFt (last visited Sept. 14, 2017) 23

TABLE OF AUTHORITIES—Continued

Page(s)

Amy B. Wang, *Trump asked for a 'Muslim ban," Giuliani says – and ordered a commission to do it 'legally'*, Wash. Post, Jan. 29, 2017 26

Sarah Wildman, *9 Questions about the global refugee crisis you were too embarrassed to ask*, Vox (updated June 20, 2017), http://bit.ly/2p8N5k0 24

Matthew Wisner, *Donald Trump Calls for End of Visa Waiver Program*, Fox Business (Mar. 22, 2016), http://fxn.ws/1pHa1n8 29

INTERESTS OF AMICI[1]

Oxfam America, Inc. and its affiliates (Oxfam) have worked around the globe in more than 90 countries to combat poverty and injustice. Although Oxfam plays a critical role in responding to immediate crises, its ultimate goal is to address the root causes of violence and poverty by supporting civil society so that communities can address their own problems. Oxfam accordingly addresses the institutional issues that keep people poor and marginalized: inequality, discrimination, and unequal access to resources including food, water, and land.

Oxfam employs 8,500 people worldwide, works with 60,000 volunteers, and operates in four of the six countries targeted by Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) ("Order" or "EO2") (Yemen, Syria, Somalia, and Sudan), with more than 300 employees stationed in those four countries. Oxfam provides infrastructure and direct aid to refugees, including to refugees from Somalia and Syria living in neighboring countries. In Syria, Jordan, and Lebanon, Oxfam is helping more than 2 million people with life-saving clean water, sanitation, and vital support for families who have lost everything. Oxfam is one of the few non-governmental organizations currently working in Sudan, providing desperately

---

[1] All parties have consented to the filing of this brief. Letters evidencing such consent have been provided to the Clerk of the Court. No counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund its preparation or submission.

needed aid, including clean water and sanitation programs, to people in the Darfur region and beyond. The Executive Order harms Oxfam and the organizations with which it works, and undermines its mission to help people escape violence and build better lives. Oxfam, therefore, has a direct interest in the outcome of this case.

The International Rescue Committee (IRC) is a non-profit, non-sectarian global organization that was founded in 1933 and operates in over 40 countries around the world. IRC is one of nine refugee resettlement organizations in the United States that contracts with the U.S. Department of State to resettle pre-screened refugees. The IRC's core mission is to serve people forced to flee from war, conflict, and disaster, and help them survive, recover, and gain control of their lives. A substantial part of the IRC's work is providing aid to refugees, which it does recognizing that refugees are the victims of terror, not the perpetrators of it. Over the past 40 years, the IRC has resettled roughly 370,000 global refugees in cities throughout the United States.

The IRC currently operates in 28 cities to oversee domestic refugee resettlement. Starting from the moment a new refugee arrives at the airport, the IRC provides essential services to maximize successful resettlement through its 28 U.S. offices. These offices serve as a free, one-stop center for refugees' needs during their pivotal first months in the United States, providing immediate aid, including food, housing, and medical attention. The Executive Order suspending the United States Refugee Program has interfered with the IRC's ability to carry out its mission and directly harms those the IRC serves: refugees awaiting

resettlement to the U.S. and those already residing here waiting to be reunited with them.

The U.S. Committee for Refugees and Immigrants is a not-for-profit organization founded in 1911. USCRI is one of nine refugee resettlement organizations in the United States that contracts with the U.S. Department of State to resettle pre-screened refugees in the United States. To carry out its protective mission, USCRI has created an extensive nationwide network of organizations and individuals. Since fiscal year 2011, USCRI has resettled 50,553 people through its network, including 11,127 in the fiscal year ending September 30, 2016. Many of the refugees who were resettled in 2016 were victims of the ongoing violence in Syria and Iraq.

The Executive Order suspending the United States Refugee Program significantly interferes with USCRI's mission and operations. The Executive Order directly harms not only USCRI, but also the individuals and entities in the USCRI network who stand ready to assist these heavily-screened displaced individuals—many of whom are women and children, and all of whom are the victims of horrific situations in their home countries—integrate into, and become self-sufficient members of, American society. USCRI appeared as an *amicus curiae* before the Ninth Circuit, and also filed a response in this Court in opposition to the government's motion to stay the Ninth Circuit order affirming the modified injunction.

Exodus Refugee Immigration Inc. (Exodus) is a non-profit, refugee resettlement affiliate agency founded in 1981 in Indianapolis, Indiana. Exodus is dedicated to the protection of human rights by serving the resettlement needs of refugees and other displaced

people fleeing persecution, injustice, and war by welcoming them to Indiana. Exodus partners with various community organizations and employers to empower refugees in their initial months, days, and years in the United States by providing assistance with housing, medical and mental health case management, English language acquisition, employment, and immigration needs.

Exodus has a record of welcoming refugees from many nationalities, cultures, languages, faiths, and political persuasions. These individuals have come to Indiana from 33 different countries, 4 of which are included in the Executive Order's list of travel-blocked countries (Iran, Somalia, Sudan, and Syria). In fiscal year 2016, Exodus received 947 refugees through the admissions programs and expected similar arrivals in 2017 until the Executive Order curbed resettlement and significantly reduced the expected arrival number by more than 400. The Executive Order pausing refugee admissions has obstructed Exodus' mission to welcome refugees to Indiana and has hindered the process of resettlement for many refugees overseas who have already been assured to the agency by the federal government's resettlement process. Further, the Executive Order has hampered the process of reunification for many refugees served by Exodus whose family members abroad await resettlement.

INTRODUCTION AND SUMMARY OF ARGUMENT

On January 27, 2017, President Trump issued Executive Order No. 13,768, 82 Fed. Reg. 8977 (Jan. 27, 2017) ("EO1") designed to fulfill his campaign promise to ban Muslims from entering the United States. Although couched as a national security measure, EO1

was explicitly grounded in anti-Muslim stereotypes, banned all immigration from seven majority-Muslim countries for 90 days, banned all refugees for 120 days, and lowered the refugee limit (the "cap") for 2017 from 110,000 to 50,000. *Id.* at 8978-79. EO1 exempted religious minority refugees, and in statements the day he enacted it, President Trump explained the exemption was meant to protect Christian refugees.

Amidst public outcry against this "Muslim Ban" and widespread confusion in its implementation, the Ninth Circuit upheld an injunction prohibiting EO1 from taking effect. That led President Trump to issue a second, slightly revised Executive Order on March 9, 2017. EO2 maintained the same basic structure as EO1. Section 2 of EO2 bans immigration from six of the seven originally named Muslim nations, and section 6 suspends the United States Refugee Program (USRAP) for 120 days and reduces the cap on refugees for fiscal year 2017 from 110,000 to 50,000. 82 Fed. Reg. at 13,210-13, 13,216.

The hastily issued second Executive Order is no more lawful than the first one. This *amicus* brief focuses on EO2 section 6. When promulgating this moratorium on refugee admissions and cutting total admissions by almost 60%, the President exceeded his statutory authority under the Immigration and Naturalization Act ("INA"), 8 U.S.C. § 1101 *et seq.*, in two respects. First, the President impermissibly reduced the refugee cap unilaterally without prior consultation with Congress. Congress took the unusual step of explicitly requiring such consultation when the President sets the cap for each fiscal year or increases it to accommodate refugee crises in order to ensure itself a robust role and ensure an orderly, well-planned,

and predictable refugee admission process. *See id.* § 1157. To the extent the President has authority to reduce the cap mid-year, he must engage in the same consultation process. Instead, the President bypassed Congress entirely, and his knee-jerk unilateral action threatens exactly the kind of upheaval that Congress passed the statute to avoid.

Second, to the extent that the President purported to rely on his statutory authority under section 212(f) of the INA, *id.* § 1182(f), the President failed to make the requisite "find[ing]" that the class of refugees as a whole (who were banned by the moratorium) or refugees numbered 50,001-110,000 (who were excluded by the new cap) are detrimental to the interests of the United States. Nor could the President plausibly have done so. This "class" of refugees includes tens of thousands of children and refugees from parts of the world that implicate none of the concerns that the President recited, and both long-term and recent experience establishes that refugees are far less likely than this country's own citizens to commit a terrorist attack in the United States.

In addition to violating the INA, the President's issuance of EO2, including its refugee provisions, violated the core Establishment Clause command that government may not take actions that, in the eyes of a reasonable observer, discriminate among religions by denigrating a particular religion. In general, of course, government actions are assessed on their own terms, not based on ephemeral statements by government actors leading up to or later explaining them. But every principle has its limits, and this Court has rightly refused to turn a blind eye in those rare circumstances when governmental actors have declared outright that

they have acted with unconstitutional intent or animus. That is, sadly, the situation here. Candidate, President-elect, and President Trump's own statements confirm that he issued EO1 and EO2 to fulfill his repeated campaign promise to enact a Muslim ban, and the text of the Order and its disproportionate effect on Muslim refugees reflect that abiding animus.

The President has broad authority over the country's borders, but that authority remains subject to the limits established by Congress and the Constitution. EO2 is not a valid exercise of executive authority.

ARGUMENT

I. THE PRESIDENT'S REDUCTION OF THE REFUGEE CAP VIOLATED THE TIMING AND CONSULTATION REQUIREMENTS OF 8 U.S.C. § 1157

The INA created an oversight scheme for refugee admissions that is codified at 8 U.S.C. § 1157. Section 1157 requires the President to set, and allows him to raise, annual refugee admissions limits provided he follows specific timing, consultation, and public disclosure requirements. The statute grants the President no authority to *lower* the refugee cap. But to the extent that it may be read to allow him to do so, it must be read to require the same consultation as when the President sets or raises the refugee cap. When the President acts unilaterally without engaging in this required consultation process, he violates the statute, undermines the role of Congress, and disrupts the efforts of the voluntary agencies on whom the government relies to implement its resettlement programs.

When he lowered the refugee "cap" in EO2 section 6, President Trump failed even to acknowledge the consultation requirements of section 1157, much less comply with them. The Order violates the text and the purpose of section 1157.

A. The President's Unilateral Reduction Of The Refugee Cap Violated The Requirements Of Section 1157

In issuing EO2 section 6, the President failed to comply with the consultation procedures of section 1157, which Congress established to ensure that it and critical stakeholders would have input in the establishment of the annual targets for refugee resettlement in the United States. Subsection (a)(2) provides that "the number of refugees who may be admitted under this section in any fiscal year after fiscal year 1982 shall be such number as the President determines, *before the beginning of the fiscal year and after appropriate consultation*, is justified by humanitarian concerns or is otherwise in the national interest." 8 U.S.C. § 1157(a)(2) (emphasis added). Subsection (e), in turn, defines "appropriate consultation" as "*discussions in person* by designated Cabinet-level representatives of the President with members of the Committees on the Judiciary of the Senate and of the House of Representatives" to review the refugee situation and the participation of the United States in resettlement of refugees in light of specific information defined by statute. *Id.* § 1157(e) (emphasis added). Subsection (e) applies to both *setting* the refugee cap under (a) and *raising* it under (b). *See id.* §§ 1157(a), (b), (e); *see also* 123 Cong. Rec. 3431 (1977); Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the*

Refugee Act of 1980, 19 San Diego L. Rev. 9, 52 (1981). Subsection (d) requires public disclosure of the consultation in the Congressional Record and via public hearings, along with periodic review with designated stakeholders.[2] 8 U.S.C. § 1157(d). Thus, Congress envisioned an orderly, deliberate, and collaborative process for refugee allocation taking place before the start of the fiscal year, and only after detailed consultation with designated members of Congress and an opportunity for public engagement.

Subsection (b) of section 1157 authorizes the President to alter the cap in certain situations. It provides that, when there is "an unforeseen emergency refugee situation," the President may "fix a number of refugees to be admitted to the United States during the succeeding period (not to exceed twelve months)" after consultation with Congress. *Id.* § 1157(b). But the text and legislative history make clear that this provision only allows the President to *increase* the cap. It is reserved for the emergency admission of *additional* refugees, when "the admission to the United States of these refugees cannot be accomplished under subsection (a)." *Id.*; *see also, e.g.*, *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of H. Comm. on the Judiciary*, 96th Cong. 29 (1979) (statement of Rep. Hamilton Fish,

---

[2] Notably, Subsection (d) calls for "periodic discussions" among stakeholders "for adjustments in the allocation of admissions *among* refugees," but does not envision changes to the allocated number itself. *See* 8 U.S.C. § 1157(d)(1) (emphasis added). The statute is set up so that the refugee cap is established *in advance*, so much so that even when Congress and stakeholders discuss refugees, they are not changing the refugee cap.

testimony of Hon. Griffin B. Bell, Atty. Gen.) ("*Hearings on H.R. 2816*, 96th Cong.") ("[T]he President is authorized to admit emergency situation refugees, and these are, by definition, the unforeseen situations."); *id.* at 31 ("I would recommend you keep the figure low, because the world may become calm .... I'd rather keep [the cap] low, but let the President ask for extra numbers if he needs them, in consultation with the Congress.").

The statute provides no mechanism for the President to *lower* the refugee cap mid-year. In the government's view, this means the President is free to lower the cap whenever he wishes and to do so unrestricted by the consultation requirements that apply when the cap is initially set or increased. *See* Gov't Br. 60-62. The government contends that allowing the President to lower the cap unilaterally makes sense, because the statutory process is concerned with setting limits on refugee admissions, not ensuring that any number actually be admitted. *See id.* at 61-62 (emphasizing that in practice the number of refugees admitted almost always falls short of the cap). According to the government, therefore, EO2's "refugee cap does not violate 8 U.S.C. 1157, which establishes a procedure for setting the maximum number of refugees who may be admitted each year, but does not set a minimum number who must be admitted." Gov't Br. 21.

The government is wrong. To begin with, where Congress has explicitly directed the President to set annual refugee admission caps, and explicitly authorized the President to increase the caps mid-year in emergency circumstances, the most likely inference from the statute's utter silence on mid-year lowering of

the caps is that the President lacks that authority—not that Congress delegated such authority sub silentio. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) ("We refuse, once again, to presume a delegation of power merely because Congress has not expressly withheld such power."). But even if section 1157 were interpreted to allow the President to make mid-year downward adjustments, it cannot reasonably be interpreted to allow him to do so free of the detailed consultation requirements that apply when the cap is initially set or increased. It is unreasonable to presume that Congress enumerated specific requirements the President must follow to establish the number and allocation of the refugees, as justified by humanitarian concerns and the national interest, after an obligatory consultation process, only to permit the President to order a midyear reduction ad hoc without engaging in any consultation whatsoever.

The government is of course correct that the caps are a limitation, not a target, and that nothing in section 1157 requires the President to ensure the admission of any particular number of refugees. But the discretion to admit fewer refugees is not the same thing as the power to lower the cap. By purporting formally to lower the maximum number of refugees who "may" be admitted, the President acted beyond his statutory authority.

The error in the government's contrary reasoning is clear from the following analogy. If a fire department determines that a lecture hall "may" safely contain only 100 people, the fact that classes regularly are held with

only 30 people does not change this maximum lawful capacity. If, after further inspection, the fire department lowers the maximum capacity to 50, it has altered how many people "may" be in the room at a time. In exactly the same way, when the President effects a reduction in the cap, he has *changed* the number of refugees who "may be admitted." And it is highly unlikely that Congress intended to authorize the President to unilaterally alter the number of refugees admitted, without consultation, when consultation is both explicitly required in the statute and was central to Congress's mission in enacting the INA. The consultation requirement was, after all, at the heart of the reforms of the 1980 Refugee Act. Before its enactment, the Attorney General had wide discretion unilaterally to set the number of refugees admitted to the U.S. through "parole" provisions. The 1980 Act was passed because of an increase in the number of refugee crises occurring worldwide and a corresponding need for more than an ad hoc system, *see* H.R. Rep. No. 96-608, at 6 (1979) (citing Statement of J. Kenneth Fesick, Director, U.S. Gen. Accounting Office before the Subcomm. on Asian and Pacific Affairs on *Indochine Refugee Assistance Programs* (Apr. 24, 1979), http://www.gao.gov/assets/100/99033.pdf), and a more robust coordinate role for Congress. The 1980 Act formalized the role of Congress in the refugee allocation process, ensuring a more rigorous system that allowed Congress and executive agencies jointly to plan and budget in advance.

During consideration of the 1980 Act, "the [d]ebate centered on congressional control over refugee admissions numbers and strengthening of the

consultation process." Anker & Posner, 19 San Diego L. Rev. at 56. The House Report stated "the Committee cannot over-emphasize the importance it attaches to consultation." H.R. Rep. No. 96-608 at 14. Extensive discussions on the floor and in hearings further underscored the significance that Congress attached to consultation. For instance, Representative Lundgren stated that in the past, "many of us in the Congress have felt that consultation has not been the cornerstone" and asked the Attorney General "what real signal do we have in the Congress that if we pass this legislation there would, in fact, be good faith, real efforts to consult with us before some major decision would be made by the President in the area of refugees[?] ... Would you have an objection to ... mak[ing] [the Act] very specific what we are talking about in terms of consultation with the Congress?" *Hearings on H.R. 2816*, 96th Cong. at 30 (statement of Rep. Dan Lundgren, testimony of Hon. Bell). And in the House Subcommittee hearings leading up to the 1980 Act, Chairwoman Holtzman stated that "[a]ny new legislation should clearly define what part Congress will play in refugee decisionmaking, and that role should not be a pro forma one." *Id.* at 2.

Having made such detailed provision for consultation in the initial establishment of and any interim increases in the level of the cap, the statute cannot reasonably be interpreted to allow the President to lower the cap unilaterally with no consultation at all. *See First Nat'l Bank of Atlanta v. Bartow Cty. Bd. of Tax Assessors*, 470 U.S. 583, 595-96 (1985) (refusing to infer that Congress *sub silentio* adopted a provision inconsistent with the rest of the statutory scheme). And until now, no President has

ever attempted to lower the cap mid-year, especially without consulting Congress.[3]

B. The President's Ad Hoc And Post Hoc Action Undermined The Underlying Goals Of Section 1157

Congress's emphasis on consultation was more than simply a desire to ensure a robust role for itself. Congress recognized the need for an orderly and informed refugee process. Before passage of the 1980 Act, contemporaneous commentators observed that "[t]he absence of a coherent refugee policy, as demonstrated by the use of sporadic, *ad hoc* parole actions, created needless uncertainties for voluntary agencies and for United States officials participating in resettlement. In addition, it confused other nations, causing them to become less motivated to share in refugee relief." Anker & Posner, 19 San Diego L. Rev. at 33. During the debate over the Act, members of the executive branch expressed similar concerns, explaining that the "sudden termination of previously agreed upon programs would be 'disruptive of a harmonious' relationship between the two branches and place the United States in 'an awkward international position of being unable to honor a commitment to participate in a refugee resettlement of a multilateral character.'" *Id.* at 39 (quoting

---

[3] *See* Legal Information Institute, *8 U.S. Code § 1157 - Annual admission of refugees and admission of emergency situation refugees*, https://www.law.cornell.edu/uscode/text/8/1157 (follow "Notes" tab) (a listing of each "Presidential Determination Concerning Admission and Adjustment of Status of Refugees").

Admission of Refugees into the United States: Hearings on H.R. 3056 Before the Subcomm. on Immigration, Citizenship and Int'l Law of the H. Comm. on the Judiciary, 95th Cong. 79 (1977)).

Congress understood that refugee agencies like *amici* are key to the efficient functioning of a refugee resettlement system. Under federal law, the government relies on these agencies to implement the refugee resettlement process. The statute directing the Office of Refugee Resettlement (within the federal Department of Health and Human Services) to manage the resettlement process specifies that "[i]t is the intent of Congress that in providing refugee assistance ... local voluntary agency activities should be conducted in close cooperation and advance consultation with State and local governments." 8 U.S.C. § 1522(a)(1)(B). To that end, the statute requires federal agencies to "consult regularly (not less often than quarterly) with State and local governments *and private nonprofit voluntary agencies* concerning the sponsorship process and the intended distribution of refugees." *Id.* § 1522(a)(2)(A) (emphasis added).

When Congress passed the 1980 Act, the federal Coordinator for Refugee Affairs recognized that the government's "relationship with the private volunteer agencies"—which work overseas "with the international organizations that manage the refugee camps" and "in this country ... [to] provide an important link between the federal government and the private sector in providing placement and other resettlement services"—is "[a] crucial element in both our international and domestic assistance programs." *Hearings on H.R. 2816*, 96th Cong. at 39 (statement of Dick Clark, Ambassador at Large and U.S.

Coordinator for Refugee Affairs). It was anticipated that the consultation required by the 1980 Act would "facilitate long-term planning of budget and admission levels and permit smoother functioning of assistance programs." *Id.* Consultation and stable long-term planning is vital, because an abrupt change in refugee numbers disrupts the ability of these private refugee resettlement agencies to maintain infrastructure, hire staff, and contract with local authorities and partners. And these effects in turn impact the operations and capacity of the entire refugee resettlement system.

Congress's provision for coherent and inclusive long-term planning was entirely disregarded here. Issued ad hoc and post hoc, the EOs created precisely the kind of "sudden termination" that Congress and the Executive sought to prevent through the 1980 Act. The President's abrupt unilateral actions have strained the Nation's established multi-national commitments, and devastated agencies' long-term planning efforts—precisely the consequences that Congress sought to avoid.

II. THE PRESIDENT'S REDUCTION OF THE REFUGEE CAP AND TEMPORARY BAN ON ALL REFUGEE ADMISSIONS EXCEED THE AUTHORITY CONGRESS DELEGATED TO THE PRESIDENT UNDER 8 U.S.C. § 1182(f)

When President Lyndon Johnson signed the INA at the Statue of Liberty in 1965, he stated that the law established a simple and fair test that "those who can contribute most to this country—to its growth, to its strength, to its spirit—will be the first that are admitted to this land," undoing the "harsh injustice of

the national origins quota system."[4] In that spirit, the INA contains detailed provisions and structures for the admittance of aliens into the United States. But at the same time, because pre-set policies do not always provide needed flexibility, Congress retained the President's unilateral authority to suspend entry "of all aliens or any class of aliens as immigrants or nonimmigrants" in special circumstances not otherwise provided for in the INA. 8 U.S.C. § 1182(f). This authorization, however, does not grant the President carte blanche to override the rest of the INA. Before the President may invoke his statutory authority to suspend entry of a class of aliens under section 1182(f), he must first "find[]" that entry of that class would be "detrimental to the interests of the United States." *Id.*

President Trump invoked section 1182(f) as his authority to reduce the cap on refugees from 110,000 to 50,000. He did not cite any law as his authority for suspending the entire USRAP, but the government has since claimed that section 1182(f) authorized that action as well. Gov't Br. 39. But neither action is authorized by this statute. The Order does not make anything that could qualify as a "finding" that refugees as a class are detrimental to the United States. Nor could the President plausibly have made such a finding, since the historical record establishes that, given the existing rigorous screening process, refugees as a class do not remotely threaten the public interest.

---

[4] LBJ Presidential Library, LBJ on Immigration, *President Lyndon B. Johnson's Remarks at the Signing of the Immigration Bill Liberty Island, New York* (Oct. 3, 1965), http://www.lbjlibrary.org/lyndon-baines-johnson/timeline/lbj-on-immigration.

To be sure, EO2 "proclaim[s]" that "the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States." EO2 § 6(b). It also recites that (i) "[t]errorist groups have sought to infiltrate several nations through refugee programs," *id.* § 1(b)(iii); (ii) three "individuals who first entered the country as refugees" have been "convicted of terrorism-related crimes," *id.* § 1(h); and (iii) "more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations by the Federal Bureau of Investigation," *id.*

But the "finding" that section 1182(f) requires must be more than a rote declaration and recitation. The term "finding" has a well-understood and established meaning in the law, invoking a reasoned determination. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 164 (1988) ("A common definition of 'finding of fact' is, for example, '[a] conclusion by way of reasonable inference from the evidence.'" (alteration in original) (citation omitted)); *see also Delegation of Power by Congress*, 48 Harv. L. Rev. 798, 805 (1935) ("The mere recital of [the statute's] phrases would seem inadequate as 'findings.'"); FINDING OF FACT, *Black's Law Dictionary* (10th ed. 2014) ("A determination . . . of a fact supported by the evidence . . . . Often shortened to finding."). Reducing it, as the government would, to a formalistic recitation, regardless of even facial plausibility, would make the requirement of a finding meaningless, and Congress is not presumed to create empty requirements. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute' . . . ."

(citation omitted)); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (same).

For the "finding" requirement that Congress imposed on the President to accord with its established meaning, the President must do more than simply declare he has made one. While the government wishes to claim that the President's burden to justify a section 1182(f) exclusion is minimal, there is a point at which an exclusion is so illogical or fundamentally unsupported by reason that a mere proclamation cannot sustain it. And on the face of EO2, there is nothing justifying a ban on *all* refugees.

The text of EO2 is insufficient to satisfy even that most minimal requirement. None of the supporting facts recited in EO2 suggests that refugees present heightened risks. The Order states that "[t]errorist groups have sought to infiltrate several nations through refugee programs," but does not claim that any such infiltration attempts were successful, much less that they would have posed any danger to the United States in light of our country's rigorous vetting procedures. The Order also identifies three refugees who have been convicted of terrorism-related crimes in this country (out of more than three million admitted here). Banning all refugees for that reason would be akin to banning all men because all three convictions in question were of men. Finally, EO2 observes that 300 refugees in the U.S. have been subjects of FBI counterterrorism investigations.[5] But those 300 refugees represent less than a tenth of a percent of all

---

[5] EO2 § 1(h).

refugees admitted since 1975,[6] and 99.95% of FBI investigations end without a terrorism conviction for attempts to perpetuate a terrorist attack against the United States.[7]

The President's failure to muster any actual support for EO2's anti-refugee provisions is unsurprising, because there is nothing innately dangerous about refugees as a class. Unlike nationals of a particular country or individuals with particular characteristics or associations, "refugees" covers a broad and unrelated range of people who lack any unifying quality that might cause them, as a class, to threaten the U.S. public interest. "[R]efugee[s]" are defined by statute as people who have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion that makes them unable or unwilling to avail themselves of the protection of their home country. 8 U.S.C. § 1101(a)(42). As such, refugees are linked solely by their status as vulnerable and displaced individuals. Their common profile is hardship and displacement, not dangerousness. In fact, UNICEF estimated that nearly half of *all* refugees worldwide are children.[8] And they include a massive number of people (including children) that have no articulable link to terrorism, even as per the reasoning of EO2. Treating refugees as a class for section 1182 purposes is not defensible.

---

[6] David Bier, CATO Institute, *Deconstructing Trump's Security Defense of His Immigration Ban* (Mar. 9, 2017), http://bit.ly/2xgHdZu.

[7] *Id.*

[8] *Nearly Half of All Refugees are Children, Says Unicef*, The Guardian, (Sept. 14, 2016), http://bit.ly/2cmFfek.

The Order's presumption of dangerousness is especially indefensible with respect to the Order's refugee cap reduction. The Order would allow the entry of refugees numbers 1 through 50,000, but bar entry of refugees numbers 50,001 through 110,000. But a refugee's place in the resettlement queue is an arbitrary and nonsensical basis for exclusion. Section 1182(f) provides the President no authority to remake immigration policy by whim.

The absence of evidence supporting the purported need to ban refugees is unsurprising for another reason: this country already applies an extremely thorough vetting process for refugees. To embark on the often years-long refugee resettlement process, an applicant first must register and interview with the United Nations (UN), which determines whether to grant refugee status.[9] To make that determination, the UN assesses whether the person is among the most vulnerable refugees and therefore eligible for resettlement in a country like the United States.[10] Once an applicant is deemed a "refugee," she is referred to a specific country for resettlement. After a refugee is referred to the United States for resettlement, she must interview with a State

---

[9] United States Citizenship and Immigration Services (USCIS), Dep't of Homeland Security, *Refugee Processing and Security Screening* (last updated Dec. 3, 2015), http://bit.ly/1YodRyW; Haeyoun Park & Larry Buchanan, *Refugees Entering the U.S. Already Face a Rigorous Vetting Process*, N.Y. Times, Jan. 29, 2017, http://nyti.ms/2o7WN2o.

[10] Park & Buchanan, *supra* note 9; Amy Pope, *Infographic: The Screening Process for Refugee Entry into the United States*, Obama White House Archives (Nov. 20, 2015), http://bit.ly/2kqqbmh.

Department partner organization.[11] The refugee then undergoes two background checks, along with three fingerprint screenings.[12] These background checks include consultation with the State Department, the Federal Bureau of Investigation, the Drug Enforcement Agency, the National Counterterrorism Center, the Department of Defense, and Interpol.[13] Syrian refugees in particular must undergo two additional steps at this point: review by a refugee specialist from the United States Citizenship and Immigration Services and review by the Department of Homeland Security.[14] Only after all of these extensive checks and screenings are complete does the refugee attend an in-person interview with a Homeland Security officer.[15] After evaluating the applicant's credibility and reviewing the case file, the officer determines whether to admit the applicant as a refugee.[16] The refugee must then undergo a screening for contagious disease and a cultural orientation class.[17] Finally, because the amount of time between the initial screening and actual departure is often significant, there is another security check before the refugee can

---

11 Park & Buchanan, *supra* note 9; U.S. Comm. for Refugees and Immigrants (USCRI), *Security screening of refugees admitted to the United States*, http://refugees.org/wp-content/uploads/2015/12/USCRI-Security-Screening-Process-5.16.16.pdf (last visited Sept. 14, 2017).

12 Park & Buchanan, *supra* note 9.

13 USCIS, *supra* note 9.

14 Park & Buchanan, *supra* note 9; USCRI, *supra* note 11.

15 Park & Buchanan, *supra* note 9.

16 *Id.*; USCIS, *supra* note 9; USCRI, *supra* note 11.

17 USCRI, *supra* note 11; USCIS, *supra* note 9.

actually travel to the United States and begin the next chapter of her life.[18] This process is far more extensive than for any other type of admission to the United States.

In fact, because of this rigidly choreographed process, the Order's refugee ban is not simply a matter of a 120-day delay. Many of the checks conducted during the refugee admission process expire after a set amount of time. For instance, some medical tests expire within three months, while other checks and screenings are valid for a little over a year.[19] The combination of these different windows of validity often leaves a refugee less than a two-month period during which all of her checks are simultaneously valid.[20] Once a check expires, during the time it takes to repeat that check, another check may expire, creating a domino effect. This becomes even more complicated when a family attempts to travel together,

---

18 Park & Buchanan, *supra* note 9.

19 *Medical Examination: Frequently Asked Questions (FAQs)*, Ctr. for Disease Control and Prevention (last updated Feb. 22, 2017), http://bit.ly/2ocISHp; *US Refugee Admissions Program: An overview of built-in security safeguards for refugee resettlement*, Int'l Rescue Comm., http://bit.ly/2oeddFt (last visited Sept. 14, 2017); Elise Foley & Willa Frej, *Court Ruling May Force Trump To Admit The Number Of Refugees Obama Wanted*, Huffington Post, Mar. 20, 2017, http://huff.to/2mUyCGi; *see also* Natasha Hall, *Refugees are already vigorously vetted. I know because I vetted them.*, Wash. Post, Feb. 1, 2017, http://wapo.st/2oEGRHZ; Ann M. Simmons, *We don't know exactly what 'extreme vetting' will look like, but screening for refugees is already pretty tough*, L.A. Times, Jan. 29, 2017, http://lat.ms/2jKJvsP.

20 Erol Kekic, *Homeland Security Chief John Kelly Says Waiting 120 Days Won't Hurt Refugees. He's Wrong*, Time (Feb. 10, 2017), http://ti.me/2lTAYT8.

because all of their windows need to line up at the same time.[21] If the window for travel expires before the refugee has made it to the United States, the refugee must generally start the process all over again from the beginning.[22] This could take up to another two years. And this delay would likely be compounded by the backlog created by the Order's dramatic decrease in total refugee admissions. The added years of waiting are more than just an inconvenience. Refugees, by definition, are the most vulnerable people on earth, fleeing persecution, lacking the most basic necessities, and at constant risk of violence. In many cases, an additional delay has life-or-death consequences.

Due in part to the extremely thorough vetting, experience demonstrates that, in fact, refugees are far *less likely* than other foreign nationals, or even United States citizens, to commit deadly terrorist attacks in the United States.[23] Between 1975 and 2015, the United States admitted 3.3 million refugees and only three (all from Cuba, all prior to 1980) engaged in deadly acts of terrorism in the United States.[24] In that time period, the annual risk of death to a United States resident by a refugee terrorist in the country was 1 in 3.64 billion.[25] (To put this in perspective, the chance of

---

21 *Id.*

22 Sarah Wildman, *9 Questions about the global refugee crisis you were too embarrassed to ask*, Vox (updated June 20, 2017), http://bit.ly/2p8N5k0; Michael Brindley, *After Trump's Executive Order, Refugees Who Were N.H. Bound Now On Hold*, N.H. Pub. Radio (Jan. 31, 2017), http://bit.ly/2pwf6hT.

23 Bier, *supra* note 6.

24 Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, Policy Analysis 13 (Sept. 13, 2016), http://bit.ly/2kem9fJ.

25 Bier, *supra* note 6.

being killed in a regular homicide was 1 in 14,000.[26]) Tourist visa holders are 1,000 times more likely than refugees to kill someone in the United States in a domestic terrorist attack.[27] Indeed, an analysis of refugee resettlement data has revealed that after refugees move into an American city, crime usually goes down, sometimes by drastic amounts.[28]

As the Cato Institute's recent report found, only 20 refugees planned, attempted, or carried out any terrorist attack in the United States from 1975 to 2015.[29] Of these attacks, only three were fatal and all three occurred before 1980 and the institution of modern vetting procedures.[30] More recently, of the 784,000 refugees resettled in the United States since September 11, 2001, just three were even arrested for planning terrorist activities, only one of those was planned to take place in the United States, and the plan was described as "barely credible."[31] The data fit the reality of refugee admission: refugees resettled in the United States are vulnerable people who, as a class, pose no threat to the public interest. The Order contains no legitimate "finding" otherwise.

---

26 *Id.*; *see also* Alex Nowrasteh, *Americans' Fear of Foreign Terrorists Is Overinflated*, Time.com (Sept. 13, 2016), http://ti.me/2jKIQVK.

27 Nowrasteh, *supra* note 24, at 5.

28 Tanvi Misra, *Are Refugees Dangerous?*, Citylab (Feb. 14, 2017), http://bit.ly/2sSlg1f.

29 Nowrasteh, *supra* note 24, at 2, 8, 13.

30 *Id.* at 13.

31 Lauren Gambino, *Trump and Syrian refugees in the US: separating the facts from fiction*, The Guardian (Sept. 2, 2016), http://bit.ly/2fQF0wP.

III. EO2, INCLUDING THE ANTI-REFUGEE PROVISIONS OF SECTION 6, IS A THINLY VEILED ATTEMPT TO EXCLUDE MUSLIMS ON RELIGIOUS GROUNDS IN VIOLATION OF THE ESTABLISHMENT CLAUSE

As a candidate, President Trump famously promised to enact "a total and complete shutdown of Muslims entering the United States."[32] That would have been blatantly unconstitutional. So this explicit Muslim ban morphed, campaign adviser Rudolph Giuliani explained, into the idea of using nationality as a proxy for religion.[33] Shortly after he was sworn into office, President Trump put that idea into action via EO1 and EO2. In light of Donald Trump's numerous statements as a candidate, President-elect, and later as President evidencing anti-Muslim animus, the Muslim-specific rationales for excluding refugees, and the disproportionate impact that the refugee ban and lowered cap have on Muslims, a reasonable observer would conclude that EO2, including the refugee-specific provisions of section 6, was driven by impermissible animus.

---

[32] Fred Barbash, *Muslim ban language suddenly disappears from Trump campaign website after Spicer questioned*, Wash. Post, May 9, 2017, http://wapo.st/2w1WTR9; *Trump's Deleted "Preventing Muslim Immigration" Statement*, The Memory Hole (Dec. 7, 2015), http://bit.ly/2wVdcML.

[33] Amy B. Wang, *Trump asked for a 'Muslim ban,' Giuliani says – and ordered a commission to do it 'legally'*, Wash. Post, Jan. 29, 2017, http://wapo.st/2gYT0lq.

A. President Trump's Statements Evince Clear Anti-Muslim Animus

President Trump's statements as a recent candidate, the President-elect, and now President bear on the assessment of whether his Executive Order was motivated by anti-Muslim animus. It is well established that the government cannot "denigrate . . . religious minorities," "signal disfavor" toward a faith, or "suggest that [one's] stature in the community [is] in any way diminished" because of one's religion. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1823, 1826 (2014). In evaluating whether a government action crossed that line, a court acts as a reasonable, "objective observer." *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005). As Respondents explain, this analysis is relevant both to assessing whether the Order's rationale is "bona fide" under *Kerry v. Din*, 135 S. Ct. 2128 (2015), and *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and to assessing whether it violates the First Amendment under *Town of Greece*. No. 16-1436 Resps. (IRAP) Br. 32-50; No. 16-1540 Resps. (Hawaii) Br. 48-52.

While a court considering unconstitutional animus must avoid "judicial psychoanalysis of a drafter's heart of hearts," that does not mean it must turn a blind eye to statements explicitly evidencing bias. *McCreary*, 545 U.S. at 862. To the contrary, a court must consider "readily discoverable fact[s]," *id.*, including the action's "historical context" and "the specific sequence of events leading to [its] passage," *Edwards v. Aguillard*, 482 U.S. 578, 595 (1987). This includes examination of statements of purpose by the lawmaker. *See, e.g.*, *id.* at 587-88, 591-94 (discussing the statements of the legislative sponsor to conclude that the law had an

illicit purpose and therefore violated the Establishment Clause).

No psychoanalysis is needed to recognize that the Executive Order was targeted *specifically* at Muslims—that is what President Trump said on many occasions.

- On December 7, 2015, then-candidate Trump issued an official statement "calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."[34]
- Candidate Trump's then-campaign manager Corey Lewandowski told CNN that the ban would apply not just to Muslim foreigners looking to immigrate to the U.S., but also to Muslims looking to visit the U.S. as tourists.[35]
- The next day, then-candidate Trump explained how this would work. "[T]hey would say, are you Muslim?" Contributor Willie Geist then volunteered "And if they said yes, they would not be allowed in the country," to which Trump responded "That's correct."[36]

---

[34] Fred Barbash, *Muslim ban language suddenly disappears from Trump campaign website after Spicer questioned*, Wash. Post, May 9, 2017, http://wapo.st/2w1WTR9; *Trump's Deleted "Preventing Muslim Immigration" Statement*, The Memory Hole (Dec. 7, 2015), http://bit.ly/2wVdcML.

[35] Jeremy Diamond, *Donald Trump: Ban all Muslim travel to U.S.*, CNN (Dec. 8, 2015), http://cnn.it/1QbhhSR.

[36] Nick Gass, *Trump not bothered by comparisons to Hitler*, Politico (Dec. 8, 2015 7:51 AM), http://politi.co/1XYTrc8.

- Shortly thereafter, on January 18, 2016, then-candidate Trump vowed: "We're going to protect Christianity"; "I don't have to be politically correct, we're going to protect it."[37]
- On March 9, 2016, then-candidate Trump said "I think Islam hates us,"[38] and two weeks later on March 22, 2016, he declared "we're having problems with the Muslims, and we're having problems with Muslims coming into the country."[39]
- On March 22, 2016, he tweeted "Incompetent Hillary, despite the horrible attack in Brussels today, wants borders to be weak and open-and let the Muslims flow in. No way!"[40]
- On May 4, 2016, when a reporter asked then-candidate Trump "Do you stand for example by the idea of a ban against foreign Muslims coming here?" he responded "I do. We have to be vigilant."[41]

---

[37] Alex Swoyer, *Donald Trump Quotes the Bible at Liberty University, Tells Youth 'Never Give Up'*, Breitbart (Jan. 18, 2016), http://bit.ly/2xVv2yw.

[38] Theodore Schleifer, *Donald Trump: 'I think Islam hates us'*, CNN (Mar. 10, 2016), http://cnn.it/1RBk6Z4.

[39] Matthew Wisner, *Donald Trump Calls for End of Visa Waiver Program*, Fox Business (Mar. 22, 2016), http://fxn.ws/1pHa1n8.

[40] Donald J. Trump (@realDonaldTrump), Twitter (Mar. 22, 2016, 7:59 PM), http://bit.ly/2wl9EBt.

[41] *Presumptive GOP Nominee Trump Goes One-on-One With Lester Holt* at 2:07, NBC News (May 4, 2016), http://nbcnews.to/1SZtIAq.

- As a candidate, sometimes Donald Trump would make only veiled references to Islam, clear only from the context and his prior statements. For instance, he stated that "Hillary Clinton also wants to push to bring in 620,000 refugees in her first term—a number of whom come from countries where women and gays are horribly brutalized—which will weaken our tolerant way of life."[42]
- When asked soon after the election, on December 21, 2016, whether he had rethought or reevaluated his "plans to create a Muslim register and ban Muslim immigration to the United States?" then-President-elect Trump responded "You know my plans."[43]
- Now-President Trump continues to showcase the same anti-Muslim animus. In response to the recent Barcelona terror attack, President Trump tweeted: "Study what General Pershing of the United States did to terrorists when caught. There was no more

---

42 Donald J. Trump for President, Inc., *Donald J. Trump Calls for American Independence, Lays Out Need for Immigration Security* (Aug. 24, 2016), http://bit.ly/2wqaLzG.

43 *Donald Trump: "...You Know my Plans..."* at 0:12, Daily Mail.com (Dec. 22, 2016), https://www.youtube.com/watch?v=ip4vsPInyRY; Madeline Conway, *Trump stokes fears he'll pursue Muslim ban*, Politico (Dec. 22, 2016 8:09 AM), http://politi.co/2hgmkXM; Katie Reilly, *Donald Trump on Proposed Muslim Ban: 'You Know My Plans'*, Time.com (Dec. 21, 2016), http://ti.me/2hWs4FG.

> Radical Islamic Terror for 35 years!"[44] This is a reference to an apocryphal story that General Pershing killed Muslim terrorists with bullets dipped into the blood of pigs and buried their bodies with the bodies of pigs.[45]

As Rudolph Giuliani explained, in an attempt to avoid the obvious constitutional problems with an explicit anti-Muslim ban, nationality was introduced as a proxy for religion. But before and after assuming office President Trump made clear this was just window-dressing.

- On July 26, 2016, he explained that while he was *not* "changing [his] position" on what Vice-Presidential candidate Pence had termed his "[c]all[] to ban Muslims from entering the U.S.," he would "call it territories" instead.[46]
- Upon signing EO1, after reading the title aloud (which is "Protecting the Nation from Foreign Terrorist Entry into the United States"), President Trump said "We all know what that means."[47]

---

44 Donald J. Trump (@realDonaldTrump), Twitter (Aug. 17, 2017, 11:45 AM), http://bit.ly/2fO75Fi.

45 Dan Bowens, *Trump tweets fake Gen. Pershing story after Spain attack*, FOX 5 (Aug. 17, 2017), http://bit.ly/2jjr8wH; *General Pershing on How to Stop Islamic Terrorists*, Snopes (last updated Aug. 17, 2017), http://www.snopes.com/rumors/pershing.asp.

46 Lesley Stahl, *The Republican Ticket: Trump and Pence*, 60 Minutes (July 17, 2016), http://cbsn.ws/29NrLqj.

47 *Trump Signs Executive Orders at Pentagon* at 0:36, ABC News (Jan. 27, 2017), https://goo.gl/7Jzird.

- In an interview with the Christian Broadcasting Network shortly thereafter, President Trump stated that EO1's religious minority protection provision was designed to give Christians priority when applying for refugee status. "If you were a Muslim you could come in [to the United States], but if you were a Christian, it was almost impossible," he said. "[T]hey were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair. So we are going to help them."[48]
- EO1 employed multiple thinly veiled references to stereotypes regarding Islam, mentioning "honor killings," "violent ideologies," "persecution of those who practice religions different from their own," and "foreign nationals" being "radicalized." EO1 §§ 1, 10(a)(ii), 10(a)(iii).
- The son of the National Security Advisor, himself a past member of President Trump's staff, repeatedly called the first Executive Order a "#MuslimBan."[49]

---

[48] David Brody, *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority As Refugees*, CBN News (Jan. 27, 2017), http://bit.ly/2kCqG8M. President Trump made similar claims regarding Christian and Muslim refugees at least as far back as July 11, 2015. *See also* Louis Jacobson, *Donald Trump says if you're from Syria and a Christian, you can't come to the U.S. as a refugee*, PolitiFact (July 20, 2015), http://bit.ly/1CLkBPj (quoting, and determining as false, Trump making the same claims in a speech on July 11, 2015).

[49] Mathew Nussbaum, *Flynn's son says 'Muslim ban' is 'necessary'*, Politico (Jan. 29, 2017), http://politi.co/2k6e2jr.

The second Executive Order eliminated some of the more glaring indications of its anti-Muslim purpose, but it is infected by the same discriminatory intent. Again, President Trump's own statements confirm this. He described EO2 as simply "a watered-down version of the first one"[50] and a senior White House policy adviser told Fox News that "fundamentally, you're still going to have the same basic policy outcome" as the original.[51] And in April, President Trump vowed that, when it came to refugees, "I'm going to be helping Christians big league."[52]

In assessing the intent of EO2, it is not impermissible judicial psychoanalysis to take the President at his word and consider his repeated and consistent statements linking the successive executive orders to express anti-Muslim bias. In *McCreary*, this Court considered a third attempt by local government to create a courthouse display including the Ten Commandments after two prior displays had been struck down as unconstitutional. This Court held that its review was not limited to the "latest news about the last in a series of governmental actions" because "the world is not made brand new every morning," "reasonable observers have reasonable memories," and to impose such a limitation would render a court "an absented-minded objective observer, not one presumed

---

[50] Jacob Pramuk, *Trump may have just dealt a blow to his own executive order*, CNBC (updated Mar. 16, 2017), http://cnb.cx/2p4LPOi.

[51] Kevin Lui, *Comments by Stephen Miller and Rudy Giuliani Cited in Judge's Decision to Block Trump's Travel Plan*, Time (Mar. 15, 2017), http://ti.me/2wSX0hh.

[52] Scott Johnson, *At the White House with Trump*, Power Line (Apr. 25, 2017), goo.gl/ZeXqhY.

familiar with the history of the government's actions and competent to learn what history has to show." *McCreary*, 545 U.S. at 866. As in *McCreary*, "[n]o reasonable observer could swallow the claim that" President Trump has "cast off the objective so unmistakable" in his public statements and in the original Executive Order. *Id.* Indeed, the President has not even tried to cast off EO1's objective, repeatedly equating the two Orders.

B. The Bias Animating EO2 Extends To Section 6

The refugee provisions of EO2 are specifically motivated by the same anti-Muslim bias as the country ban. That is clear from the face of the Order: its only articulated basis for halting USRAP or lowering the refugee cap is the purported danger of terrorism from refugees from Muslim countries. EO2 § 1(h). Given President Trump's repeated statements linking or equating Islam and terrorism, and the facial implausibility of the stated national security concerns with respect to refugees, a reasonable observer would conclude that the refugee provisions of EO2 were animated by the same religious discrimination animating the travel ban.

A reasonable observer would also appreciate that, in practice, section 6 has a disproportionate impact on Muslims. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 487 (1997) ("[I]mpact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions."). Even though Muslims comprise just 23% of the global population, they represented 46% of

refugees admitted to the United States in 2016.[53] Indeed, 65% of the world's refugee population came from 49 Muslim-majority countries in 2015,[54] and just three of those countries—Syria, Afghanistan, and Somalia—account for 54% of all refugees worldwide.[55] The fact that Muslims are disproportionately represented in the global refugee population and in USRAP makes shutting off refugee admissions an especially efficient way to keep Muslims from entering the United States.

* * *

The First Amendment bars the government from giving, or appearing to give, a stamp of approval or disapproval to any religion. A reasonable observer would conclude that EO2 section 6 violates this fundamental principle.

---

53 Philip Connor, Pew Research Center, *U.S. Admits Record Number of Muslim Refugees in 2016* (Oct. 5, 2016), http://pewrsr.ch/2cSmd2t; *see also* Pew Research Center, *Religious Composition by Country, 2010-2050* (Apr. 2, 2015), http://pewrsr.ch/2nMIS0G.

54 *See* Pew Research Center, *Religious Composition by Country, 2010-2050* (Apr. 2, 2015), http://pewrsr.ch/2nMIS0G (providing religious demographics by country); UNHCR, *Global Trends: Forced Displacement in 2015* at 62-65 (2016), http://bit.ly/2wVw5AU (providing number of refugees by country under UNHCR mandate).

55 UNHCR, *supra* note 54, at 3.

CONCLUSION

The Court should affirm the decisions of the Ninth and Fourth Circuits.

Respectfully submitted,

CHRISTOPHER MORTWEET
K. RUBY BIELIK
LATHAM & WATKINS LLP
140 Scott Drive
Menlo Park, CA 94025
(650) 326-4600

RICHARD P. BRESS
Counsel of Record
ALEXANDRA SHECHTEL
ALAN BILLHARZ
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
rick.bress@lw.com

Counsel for Amici Curiae *Oxfam America, Inc., International Rescue Committee, and Exodus Refugee Immigration Inc.*

JAYNE FLEMING
REED SMITH LLP
599 Lexington Avenue
22nd Floor
New York, NY 10022
(212) 549-0217

JAMES C. MARTIN
DONNA M. DOBLICK
DEVIN M. MISOUR
REED SMITH LLP
225 Fifth Avenue
Suite 1200
Pittsburgh, PA 15222
(412) 288-3131

Counsel for Amicus Curiae *U.S. Committee for Refugees and Immigrants*

September 18, 2017